Thinking Seriously: Discrimination in Papua Asymmetry Autonomy

Dhia Al Uyun
Faculty of Law Universitas Brawijaya, Indonesia
Corresponding author’s email: diah.al@ub.ac.id

Abstract: The land of Papua is a gift. However, this gift belongs to the indigenous Papuan, so it is right when special autonomy interpreted the benefits of the original intent of the indigenous Papuan. This research is a doctrinal research with primary and secondary legal materials which are analyzed textually and contextually so that it finds the men behind the rule and the discourse of positive and negative discrimination that occurs. This discourse produces a particular light that special autonomy does not guarantee a solution to the Papuan conflict. Thinking Seriously about Special Autonomy Discrimination in Papuan results in a analysis that legal orientalism is influential in this matter. Referendum is a solution but does not solve the root of the problem. The Noken system will strengthen a patrimonial consolidated democracy. What the central government needs to do is resolve past human rights cases, accommodate people’s aspirations which have been manifested in various demonstrations and open space for dialogue between Papuan nationalists and other Indonesians. Special Autonomy is inherently regional within the federal state which is a middle way to overcome the power struggle over Papua.

Keywords: Papua, Democracy, Discrimination, Legal orientalism, Special autonomy

1. Introduction

Thinking Discrimination of Papua Asymmetry Autonomy means thinking about how autonomy occurs in Indonesia. Autonomy regulations originate from Desentralisatie Wet 1903, Law Number 1 Year 1945, Law Number 22 Year 1948, Law Number 1 Year 1957, Presidential Decree Number 6 Year 1959, Law Number 18 Year 1965, Law Number 5 Year 1974, Law Number 22 Year 1999, Law Number 32 Year 2004, Law Number 23 Year 2014 About Local Government and its changes. Special Autonomy is a new development after the 1999 era, a year after reform.

Post-reformation in 1998, regional autonomy was directed at respecting democracy. Indonesia democracy in previous era was classified collusive, consolidated but patrimonial and low quality democracy (Aspinall & Miezt, 2010). Collusive and delegative democracy aims to form a developmental democracy, namely democracy that does not focus on neoliberal, but focus on activities to achieve future democratic goals (Slater, 2012). This means that there is no precise form of democracy that has ever been experienced. Comparison between countries is important for coping strategies for the ideal form of democracy, this is influenced by views on the maturity of democracy. However, this condition is related to political ethics, meaning that the quality of the individual influences the quality of democracy.
A Consolidated but patrimonial is a measured democracy based not on democratic roots but on borgeous involving the military (Webber, 2006). Democracy has the core of the people, with the right representation, democracy can find its core. However, if these representatives use power for their personal interests, the people will not benefit from democracy.

Low quality democracy shows multiparty elections, not accompanied by rule of law and protection of the social community (Aspinall & Mietzner, 2019). Multiparty is a central mechanism, in customary law communities, multiparty has no influence. The construction of local democracy which consists of 3 (three) buildings, namely cultural values, the role of actors and regional institutions is used to inhibit this (Zuhro, 2009). Such barriers can be overcomes while the state fulfills, respect and protects the rights of the people and the rule of law that puts human rights first.

The reformation event that changed the state order was accompanied by the Amendment to the 1945 Constitution. There are several reasons why Amendment of 1945 Constitution is required. First, a rapid increase in population accompanied by an increase in the necessities of life. Second, the 1945 Constitution opens up gaps for authoritarian rule and perpetuates the practice of Corruption, Collusion, and Nepotism (KKN). Third, in the 1945 Constitution there are provisions that needs to be emphasized and clarified. Fourth, the preparation of the 1945 Constitution was carried out briefly and hastily. Fifth, there are overlapping provisions in the 1945 Constitution (Sharma, 1999). Sixth, article 5 paragraph (1) and paragraph (2), article 21 paragraph (2), article 22 paragraph (1) and paragraph (2) are contrary to the principles of democracy where the DPR is limited to approving and ratifying laws. Eighth, Article 33 paragraph (2) and (3) which allows monopoly by the state. Ninth, there are no articles that divide and limit power (Sharma, 1999).

Distribution of power can be done vertically and horizontally. The vertical division takes the form of sharing the authority of the central government and regional governments. The shape is a symmetry, while the asymmetry is known as a special district (Mccarthy, 2003). One of the reasons for this is the benefits for indigenous Papuans. Due to past discrimination

The Asymmetry Autonomy Discrimination is real. It was the autonomy process began from different thinking among the authority and the local people. The principle of legal order and the aim of local people can same. But, the distance of the principle of legal order and the aim of local people, made different norm and decision. It was a basic problem of Papua. By the time, the basic problem growth another problem, examples; killed demonstration, cut off internet in Papua, and etc.

The Philosophy of Asymmetry Autonomy are pluralism and self determination. The Pluralism means every region of Indonesia can manage their region on their own. The culture and characteristic of the region become specific autonomy, that called Asymmetry Autonomy. The Article 18, 18A and 18B Indonesian Constitution respect it.
The Act differ resulting difference. It is the part of discrimination. The discrimination begin from the act that cause perceive distinction penetration, judgement, perception, discernment in the result of showing of different or favoritism in treatment (Gerards & Senden, 2009). The experience of Janneke seen, The European Court of Human Rights confuse to definite and to judge the proof of rights that is fundamental (Statsky, 1985). That means, no simple way to take some abstract to real condition. Article 1 Law 39 Years 1999 On Human Rights require negative discrimination. But Asymmetry Autonomy is positive discrimination called affirmative action. Positive discrimination is useful for achieving the intended goals. The intended purpose is the realization of equality before the law.

MPR Decree Number IV of 1999 establishes Papua as a special autonomous region for Papua. Papua has always been a power struggle in its history. Starting from the kingdom period (Sriwijaya vs Majapahit), the colonial period (Spain vs the Netherlands, the Netherlands vs England), post colonialism (Indonesia vs the Netherlands), and post-integration (pro integration with Indonesia vs pro Papua Merdeka) (Dwiyanto, 2007). The power struggle before integration is related to natural and territorial potentials. Meanwhile, after the integration of Papua, the problems relate to different needs, and the impact of development as well as past problems that have not yet ended. The shape of the bird’s head region has a philosophy close to nature. This character is a general character of indigenous and tribal peoples in the world.

In 1551, the Portuguese, led by Antonio d’Abreau, built a Portuguese fort named Kenari Tinggi (Hosio, 2009). Kenari Tinggi fort be in the Marsinam Mountains, West Papua. The name Nieuw Guinea was stated by the Spanish sailor Ynigo Ortiz de Retez who was black. The title is similar to the African nation. In 1663 the Dutch declared papua to be owned by the king. Papua is included in the Resident of Ternate in 8 (eight) Afdeling Noord New Guinea (Hosio, 2009). The year 1895 was signed Staatsblads van Nederlands Indie Number 220 and 221 which stated that West Papua (Irian Jaya) was controlled by the Netherlands and East Papua (Papua New Guinea) was controlled by the British. In 1944-1949, 400 Papuan elites studied at educational institutions founded by the Dutch through the Hollandia (Jayapura) civil service school. The New York Agreement dated 15 August 1962, the Netherlands handed over Papua to the Indonesian government. On May 1, 1963 Papua became fully Indonesian property (Dwiyanto, 2007).

This trip shows that Papua is the last region to join Indonesia. Indonesia has 35 (thirty five) provinces since Papua is divided into two, namely Papua and West Papua. This division make it easier for the central government, but violates the essence of the bird’s head as a territorial unit. This is evident from the Papuan People Assembly (MRP), which consists of adat representation, religious representation, and women’s representation in one institution. Therefore, this research seeks to find answers to what form the clash of narratives between the central government and the nationalist movement in interpreting the discrimination of special autonomy in Papua Land? In further writing, it is mentioned about Papua Land, because there are 2 (two) provinces in it. The mention of the term Papua means not recognizing West Papua which is both in the Land of Papua.
2. Method

This section is the most important section of your article. The analysis or results of the research should be clear and concise. The results should summarize (scientific) findings rather than providing data in great detail. Please highlight differences between your results or findings and the previous publications by other researchers.

This type of research is doctrinal research using primary and secondary legal materials to explain the research problem. Doctrinal research is research which provides a systematic exposition of the rule governing a particular legal category, analyses the relationship between rules, explain areas of difficulty and, perhaps, predicts future development (Hutchinson, 2018). The legal category in question is the special autonomy of the Land of Papua. The primary legal material consists of statutory regulations, namely the 1945 Constitution, Law Number 39 of 1999 concerning Human Rights and Law Number 21 of 2000 concerning Special Autonomy for Papua and other implementing regulations. Secondary legal materials are a variety of literature and research results on Papua. This legal material was collected based on literature review and analyzed by textual and contextual analysis. Textual is meant to get the meaning of each proportion about discrimination in the special autonomy arrangement in Papua, while contextual is meant to connect the meaning with the other interpretations in implementing regulations.

3. Papua-specific Autonomy Regulation: Positive or Negative Discrimination?

The initial question about Papua is whose land belongs to Papua? This question reminds us of the philosophical problem that the Land of Papua is owned by Papuans, both Papua Province and West Papua Province (hereinafter referred to as Papuans). The Papuans in question are indigenous Papuans. The definition of indigenous Papuans takes several forms. First, the Special Regional Regulation of Papua Province Number 19 of 2008 concerning Protection of Intellectual Property Rights of Indigenous Papuans. The definition of Indigenous Papuans is a person from the Melanesian Race who consists of ethnic Papuan an/or who are accepted/recognized as indigenous Papuans. This definition is important in determining the benefits of this distinction.

This distinction is positive discrimination. Discrimination resulting from negative discrimination in the past. Negative discrimination in the past resulted from the closed access for indigenous Papuans to obtain human rights, especially the right to decent living. This right cannot be fulfilled due to the lack of education of the indigenous Papuans, limited access to information, facilities and infrastructure that are left behind compared to the Java region, and the monopoly of economic activity by migrants. Migrants come from areas that have better access to information than Land of Papua so that they can compete optimally in Land of Papua, leaving behind indigenous Papuans. This has an impact on the monopoly of facilities, resulting in negative discrimination for indigenous Papuans.
Other definitions are carried out by other institutions. Indigenous Papuans based on a meeting of the Population Office for Manpower and Transmigration of West Papua Province, Chairman of the Manokwari Region Papuan Customary Council, West Papua SKPD, academics, community leaders, religion leaders, youth leaders, recommendations from the Papuan People Assembly at the Interdep Meeting on December 3, 2009 and meeting Intensive from BPS, the classification is obtained that what is meant by indigenous Papuans are: (1) residents whose parents are Papuan, (2) residents whose fathers are Papuan, but their mothers are Non Papuan, (3) residents whose fathers are Non Papuan, but whose mothers are Papuan, (4) Non-Papuans who are married Papuans, (5) Papuans who are traditionally appointed as Papuans, (6) Non-Papuans who are appointed as indigenous Papuans and (7) Non-Papuans who are already living in Papua for over 35 years (Bappeda Papua Barat, 2010). This definition expands the previous definition. This definition is made to make it easier for people who are not native to Papua to enjoy the benefits of special autonomy which puts Papuans first. The definition of indigenous Papuan depends on race which includes physical characteristics which are not something that can be cultivated, so the designation is absolute for indigenous Papuans. Papuans who are appointed to the keret/ clan are not Papuans, so they are not entitled to the benefits of being Papuans. The appointment of a keret/ clan depends on the Chieftain. Although the Chieftain has the right to do this, it is appropriate for the chief to choose the main benefit for the indigenous Papuans. People who married to indigenous Papuans are not indigenous Papuans, but rather Papuans, people who live in the Land of Papua are not native Papuans. This is because people who live in Papua, do not have Melanesian blood, and do not represent the interests of indigenous Papuans. If the classification of Indigenous Papuans widened, the real Indigenous Papuans would be more marginalized.

The determination of Indigenous Papuans is a negotiation, which is carried out by considering the aspirations of invited representatives. In fact, not all of these representations are appropriate to determine the terminology of Indigenous Papuans. The existence of another representation is a form of intervention to vague the provisions regarding Indigenous Papuans, a negative discrimination due to the reduction of the rights of Indigenous Papuans.

On the other hand, this definition shows that the classic problem of the meaning of race arises here. The classic problem in question is legal orientalism. Legal orientalism negates that these two interpretations will not produce the same narrative on a matter. So it is important who behind something bring a narrative about Papua. America has a previledge, and China who bring it is not considered. The impact of modernization is impossible for a country like China. The Pennsylvania Gazette has taken the Moral of Confucius (Webster, 2014). Article 1 of the Papua Province Special Regional Regulation Number 19 of 2008 concerning Protection of Intellectual Property Rights of Indigenous Papuans, states that the Government, which in other regional regulations is called the central government, then in this article states that the government is the government of the Unitary State of Republic of Indonesia. This proposition does not recognize Indonesia
as the central government outside the provincial government, as the federal state views the state in the context of equality.

ILO Convention Number 107 about *Indigenous dan Tribal Populations Convention* using an assimilation approach, examining groups as objects. This convention sees indigenous and tribal people in mind as outsiders. The outsider will assess what is best applied to society. This provision is different from the ILO Convention Number 169 states, indigenous peoples can identify themselves through basic criteria, a subjective approach (Webster, 2014). Subjective understanding means that each customary law community has its own specialty. It is in that mindset that the law is set for *self determination*.

One form *self-determination* is the Constitutional Court Decision No.31/PUU-XII/2014 Date March 11, 2015 on the basis of its examination of Article 18B paragraph (2), 22A, 22E, 27 paragraph (1), 28C paragraph (2), 28D paragraph (1) and (3), and Article 28I paragraph (2) and (3) of the 1945 Constitution of the Republic of Indonesia. Special Autonomy in Article 18B paragraph (2) is strengthened by the principle of non-discrimination in Article 28i to achieve equality before the law.

Petitioner petition rejects Article 154 of Law Number 8 of 2012 concerning the Election of DPR, DPD, and DPRD. In this article, it is mandatory to vote, with the provision of *one man one vote*. The Constitutional Court’s decision rejected the request. However, giving legal consideration to *Noken* can be used in Jayawijaya, not the whole of Papua, this is part of principle of justice that is local and concrete. *Noken* is an election based on deliberation to reach a consensus represented by the tribal leader, to determine the same vote. This ruling provides protection for indigenous peoples in Papua. The following are some of the regulations governing special autonomy. First, Article 4 of Law Number 22 Year 1999 concerning Regional Government provides autonomy freely at the local level, regulates and manages community interests based on community aspirations. Law Number 49 of 1999 is the basis for the expansion of the Province of West Irian Jaya through the Presidential Instruction of 2003. This Law on Regional Government uses the premise that the central government’s authority is the remainder of the regional government authority, so that the government is like guard night that oversees the implementation of regional authority. The authorities that reside in the central government are religion, monetary, fiscal, defense, and security. However, the regulation of regional expansion as a result of this autonomy uses negative discrimination thinking which is not based on the principle of self-determination. Meanwhile, positive discrimination is contained in Law Number 21 of 2001 concerning Special Autonomy for Papua Province, which in the consideration of letter (k) is based on the aspirations of the community in the Decree of the DPRD of Irian Jaya Province Number 7/DPRD/2000 dated August 16, 2000, the return
of the name Irian Jaya to Papua. The name Papua describes the ethnicity of the community, while the name Irian means Join the Republic of Indonesia Anti-Netherland or in multi-language means exposed to the sun, according to Frans Kaisiepo, a form of humiliation committed the people of Ambon, Ternate, Sangir, Manado, and other Malays (Karma, 2014).

Article 5 of Law Number 21 Year 2001 concerning Special Autonomy for Papua which provides protection for the rights of indigenous Papuans. Specific regulations are contained in Article 1 letter (g) and Article 23 paragraph (1) which states the existence of the Papuan People’s Assembly. Another thing that is a form of positive discrimination is the protection of the provincial government of the intellectual property rights of indigenous Papuans as stated in article 44, upholding the human rights of women as stated in article no 47 and recognizing the autonomy of religious institutions as contained in article 54 letter c of the Republic of Indonesia Law Number 21 of 2001. This assembly is not found in any other province. However, the principle of non-discrimination was violated by the process of standardizing regional restrictions based on the authority of the central government. Law Number 26 of 2002 states 14 (fourteen) new districts, Law Number 35 of 2003 adds one Regency so that in 2003 the number of districts becomes 27 (twenty seven).

This regional government law has been replaced by Law Number 32 of 2004 concerning Regional Government which strengthens provincial authority compared to city/ regency authority. In 2004 it was devided into Papua and West Irian Jaya Province. Article 3 paragraph (1) Government Regulation of the Republic of Indonesia Number 54 of 2004 concerning the Papuans People’s Assembly (hereinafter referred to as MRP) provides legal protection in the form of political rights by providing room for participation to form regulation and policies. This form of protection is the recognition of the existence of the Papuan People’s Assembly members consisting of those Papuans who came from representatives of indigenous, religious representatives and representatives of women in the province. But the existence of MRP is a formality, because the authority is not absolute and full agreement with the other institutions, so that what is special is supposed to be decided, changed from what was formulated. The Central Government has deployed special staff to communicate in making regional regulations in Land of Papua. The aim is to assist or provide assistance in making regulations, but in the other hand it is monitoring and limiting the freedom of the Papuan people. This thinking is about what good comes from central government, not self-determination of indigenous peoples.
In 2007 West Irian Jaya Province became West Papua. This determination is followed by setting the regulation on Papua. Article 10 of Government Regulation Number 7 of 2007 on Symbol stated that the area is a companion flag state flag, should not be greater than or equal to the National Flag. Morning Star is a symbol of unity of Papua which should be respected and not be restricted. The form of allowing the Morning Star flag to be raised is a tribute to the specificities of the Land of Papua. The love of indigenous Papuans for the national flag is not something that must be enforced through regulations, but grows and develops in the hearts of indigenous Papuans.

On the other hand, the regulatory approach used appears in budgeting arrangements. Article 9 paragraph (1) Special Regional Regulation of Papua Province Number 22 of 2008 concerning Protection and Management of Natural Resources of Papuan Customary Law Communities which states that the central government and regional governments in utilizing and transferring property rights of customary law communities for development purposes must obtain written consent from the citizens. Customary law communities accompanied by the provision of compensation or compensation. This provision is a double edged sword, on the one hand it grants the government the right to use and transfer the rights of customary community to customary law. This provision is negative discrimination, while the provision of compensation and compensation is a measure of legal protection in the thought of the outsider. However, it does not empower the community based on the principle of self-determination.

Another regional regulation is Article 2 of the Papua Province Special Regional Regulations Number 23 of 2008 concerning the Ulayat Rights of Customary Law Communities and the Individual Rights of Indigenous People to Land. This regulation recognizes the existence of customary law communities to land. This provision constitutes positive discrimination based on self-determination based. However, in 2013, there were other regulations. Article 26 paragraph (1) of the Papua Provincial Regulation Number 4 of 2013 concerning Manpower Administration which states that indigenous Papuans prioritize at least 80% of the total participants, filling job opportunities at least 70% are indigenous Papuans and offspring by marriage, 10% were born and raised in Papua, 10% completed education in Papua, 10% were non-Papuans who had expertise. This provision applies mutatis mutandis to placements and promotions. The drawback of positive discrimination contained in the Papua Provincial Regulation Number 4 of 2013 is the quota to represent the representation of indigenous Papuans based on outsider figures, not self-determination of indigenous Papuans.
4. Discusion Between Positive and Negative Discrimination and it’s Impact for Papua Specific Autonomy

This discourse is this conception can demonstrate the principles that stem from the activities and responsibilities of the state to fulfill (O’Hare, 2000). Ursula’s opinions, Treaty of Amsterdam 1997 (ToA) not only firmly roots equality at the core of the European Union’s activities (new Articles 2 and 3(2) identify equality. Other provisions are new Article 13 establishes a legal basis for action to combat discrimination on a number of grounds, but also renews the European Union's commitment to respect human rights. In this cases the formulator uses thought Greenberg (Greenberg, 2014). Regulatory renewal is a model for attaching human rights implementation to legal terminology, so that legal principles are realized. Furthermore, Dworkin argues, at the same time positive discrimination will introduce institutions to see a particular light, which appears in the advantages and disadvantages (Dworkin, 1997).

The different discourse of positive and negative discrimination narratives will give rise to a particular light. Some of the narratives in question are First, about Papua being Indonesian territory while on other hand, according to Papuan nationalists, Papuans are not part of Indonesia (Widjojo, 2009). In this process, there is a rejection that Papua is part of Indonesia territory, this rejection can be analyzed due to the history of Papua which views Papua as the object of competing power. Even though the Papuan have their own will about how the history of Papua is related to the philosophy of the Papuan. One of the alternatives is a referendum. The referendum is a form of developmental democracy, which means forming freedom in the Land of Papua based on the democracy that Indigenous Papuans want to achieve. This alternative has several weaknesses, namely making it a one man one vote which ultimately forms a neo-liberal democracy, not a developmental democracy. The Noken system shows that philosophically one man one vote cannot be used in the decision making process. The Noken system will strengthen patrimonial consolidated democracy with borgeous elite customary communities.

Second, is that violence is a way to maintain the integrity of the Unitary State of the Republic of Indonesia, whereas according to Papuans violence is a violation of human rights. Violence is trauma for Papuans, a reminder of how power views Papuans. An Approach that uses violence by strengthening the military will foster Papuan nationalist militancy. Self-defense and the law of the jungle will prevail. In this condition, it will be difficult to see a particular light as an alternative solution. The process of withdrawing the militarism of each party means winning over one side. However, victory is not the goal of this process. The right start to see a particular light is to resolve past human rights cases, accommodate people’s aspirations which have been manifested in various demonstrations and open space for dialogue between Papuan nationalists and other Indonesians.

Third, is that development is an effort to modernize the Papuan people, while development according to Papuan nationalists is the migration of people outside Papua.
into Papua and the marginalization of Papua. Transmigration to Papua has been carried out since the New Order era. This has resulted in many non-racial Melanesian people in Papua. Economic competition has left indigenous Papuans behind, as a result of the start unequal competition. People from outside Papua have access to information and facilities, while Papuans have limited access to information. This is a reason that results in underdevelopment. Development is directed at developing natural resources in the mind of the outsider, thus imposing a pattern in other the Land of Papua.

Fourth, is that special autonomy is national integration, whereas according to Papuan nationalists, special autonomy means straightening the history of Papua, protecting the rights of Papuan, development for the Papuan and re-Papua-nization. The form of a unitary and federal state is a debate that has not yet ended in the process of the Amendment to the 1945 Constitution of the Republic of Indonesia. The solution to this debate is the ratification of Article 37 which states that does not change in the amendment process. Special autonomy is inherently regional within the federal state which is a middle way to overcome the struggle for power over Papua. In fact, special autonomy leads to institutional, regulatory and financial arrangements. The protection of the rights of Papuans is limited to formal declarations and documents. The central government did not resolve past human rights. Development is oriented towards physical development, not human development, so the conflict that occurs in Papua is about land, inheritance and special autonomy funds. On the other hand, this condition was published as a spectacle of Papua’s unpreparedness in special autonomy and the need for militarization. Similar to legal orientalism, which makes America more special than China.

5. Conclusion

 Thinking Seriously about Special Autonomy Discrimination in Papua results in an analysis that positive and negative discrimination occurs, but due to legal orientalism, positive things turn negative. Several different narratives between the government of the Unitary State of the Republic of Indonesia and the Papuan Nationalist make every matter a serious problem between two parties. This process has an impact on ordinary society. Particular light in the discourse, First, is by referendum. However, the referendum has a weaknesses due to the shift in developmental democracy to neo-liberal democracy. The Noken system will strengthen patrimonial consolidated democracy with borgeous elite customary communities. This proposition could weaken the advocacy of indigenous Papuans. Second, the right start to see a particular light is to resolve past human rights cases, accommodates people’s aspirations which have manifested in various demonstrations and open space for dialogue between Papuan nationalists and other Indonesian. Third, stop the imposition of patterns in other areas to Land of Papua. Fourth, special autonomy is characterized by regions within the federal state, which is a middle way to overcome the power struggle over Papua.
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